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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN JOHNSON, Defendant and Appellant.	B266093 (Los Angeles County Super. Ct. No. GA086510)

APPEAL from an order of the Superior Court of Los Angeles County. Michael Villalobos, Judge. Affirmed.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Benjamin Erik Johnson appeals from the order denying his petition to recall his sentence on his felony conviction for grand theft auto (Pen. Code, § 487, subd. (d)(1))[1] and resentence as a misdemeanor pursuant to section 1170.18, added by Proposition 47.[2] He contends the order must be reversed, because the trial court impermissibly considered evidence outside the record of conviction to determine the value of the automobile he took exceeded $950. Further, he contends his petition should be deemed an application to have his felony conviction reclassified as a misdemeanor

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[1] All further section references are to the Penal Code unless otherwise indicated.

[2] Proposition 47 is an initiative measure approved by the voters (Gen. Elec. Nov. 4, 2014) and took effect on November 5, 2014 (see Cal. Const., art. II, § 10 [initiative statute "takes effect the day after the election unless the measure provides otherwise"]). "The initiative: added Government Code chapter 33 of division 7 of title 1 (§ 7599 et seq., the Safe Neighborhoods and Schools Fund); added sections 459.5, 490.2 and 1170.18 to the Penal Code; amended sections 473, 476a, 496 and 666 of the Penal Code; and amended Health and Safety Code sections 11350, 11357 and 11377. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 4-14, pp. 70-74.) The electorate's stated purpose and intent was to '(1) Ensure that people convicted of murder, rape, and child molestation will not benefit from this act. [¶] (2) Create the Safe Neighborhoods and Schools Fund . . . for crime prevention and support programs in K-12 schools, . . . for trauma recovery services for crime victims, and . . . for mental health and substance abuse treatment programs to reduce recidivism of people in the justice system. [¶] (3) Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes. [¶] (4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors. [¶] (5) Require a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety. [¶] (6) [And to] save significant state corrections dollars on an annual basis [and] increase investments in programs that reduce crime and improve public safety, such as prevention programs in K-12 schools, victim services, and mental health and drug treatment, which will reduce future expenditures for corrections.' (Voter Information Guide, *supra*, text of Prop. 47, § 3, p. 70.)" (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 308.)

pursuant to subdivisions (f) and (g) of section 1170.18, because resentencing as a misdemeanor no longer is appropriate in view of the expiration of his probation.

The parties were invited to submit supplemental briefing on various issues. The issues encompassed these questions: (1) was defendant's failure to include in his petition any evidence reflecting that the value of the automobile was $950 or less fatal to his petition; and (2) was he entitled to present evidence at the hearing on the petition for consideration by the trial court.

Having received the parties' responses, we affirm the order denying relief under Proposition 47. Defendant has failed to demonstrate his eligibility for Proposition 47 relief. It is incumbent on defendant, in the first instance, to make a prima facie showing through evidence in his petition that the value of the automobile he took did not exceed $950. In the absence of this requisite, threshold showing, we need not, and therefore do not, address whether the trial court properly determined its value exceeded $950.

BACKGROUND

On June 21, 2012, defendant entered a no contest plea to committing grand theft auto sometime between May 17 and May 21, 2012, as charged in count 1. In return for the plea, the People made an "offer, three years' formal probation, count 1, 270 days of jail and restitution hearing in about 45 days to determine if there is restitution." The court advised that restitution "would include restitution for the dismissed charges as well."

The court then suspended imposition of sentence and placed defendant on formal probation for three years on certain terms and conditions, including making restitution to the victim.[3] He was given a total of 46 days of precommitment credit.

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[3] We take judicial notice of the certified copy of the April 13, 2016 minute order, which is attached to defendant's "Request to file Supplemental Letter Brief and Request to take Judicial Notice of Minute Order," dated April 15, 2016. On April 13, 2016, at a hearing on a defense motion, the trial court made a finding that defendant's "probation expired on 03/09/16."

On August 9, 2012, at the restitution hearing, the court modified the order of probation by declaring the restitution amount to be $700, payable to Jorge Santa Maria, the brother of the deceased victim.[4] The minutes reflect $700 was "the stipulated amount" of restitution.

On May 14, 2015, at the probation violation hearing, counsel for both sides advised the court $700 was the stipulated amount of restitution. The prosecutor further stated that amount "was [for] the damage to the vehicle, not the actual value of the vehicle." Defense counsel "note[d] that the owner was deceased, and the brother asked for $700." The court found defendant in violation of probation, revoked probation, and reinstated probation on certain terms and conditions, including 90 days in county jail with a total credit of 33 days.

On June 16, 2015, defendant filed a petition for recall of sentence and resentencing under Proposition 47. He asserted "the value of the stolen property was less than $950.00."

At the July 22, 2015 hearing on the Proposition 47 petition, defense counsel advised the court that she had in her file "what appears to be a note from the district attorney, and in the note it indicates that per Detective Early, a restitution amount includes $200 for a laptop and $500 for the car; that appears—that they believe was sold by impound, and that's how they arrived at the number of the stipulated amount of $700."[5] The court indicated the car was a 2001 Honda Civic, which was 11 years old as of 2012. The court noted it did not have a description or police report about the car and did not "know anything about the car."

Following a recess, the court indicated it had reviewed "some of the evidence. It's kind of informal, but we have a photograph of the car." The court noted the prosecutor

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[4] According to the probation report, the victim died from natural causes.

[5] There were two prosecutors in this case. One prosecutor appeared when defendant entered his no contest plea to grand theft auto. A different prosecutor appeared at the time of the hearings on May 14, 2015, and July 22, 2015.

had looked up the Kelley Blue Book value of the car; the value was "about $1,065 by today's standards"; and "in 2012 at the time of the offense, it probably was worth a bit more." The court then found "[t]he photos look like the car was in good condition so I don't see any reason why that value would have been diminished." After acknowledging the prosecutor's information was "kind of hearsay," the court ruled the defense bore the burden to prove the value of the car and failed to meet the burden to show its value was less than $950. The court then denied the Proposition 47 petition.

DISCUSSION

Pursuant to Proposition 47, grand theft auto is a misdemeanor if the value of the automobile did not exceed $950. (§ 487, subd. (d)(1).) Defendant contends the trial court erred in inferring the value of the automobile taken was over $950, because such inference was based improperly on extrinsic evidence outside the record of conviction. He relies primarily on *People v. Bradford* (2014) 227 Cal.App.4th 1322 and *People v. Trujillo* (2006) 40 Cal.4th 165.

The threshold issue, however, is whether defendant met his initial burden to establish his eligibility for relief under Proposition 47. He has not. A defendant is required to present in the petition itself evidence that the value of the automobile does not exceed $950. A mere allegation or assertion that the value was $950 or less is insufficient to satisfy this burden to make a prima facie showing *through evidence* of the value of the automobile. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 137 (*Perkins*); *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448-450; *People v. Sherow* (2015) 239 Cal.App.4th 875, 877, 880 (*Sherow*).)

Defendant contends that he satisfied this burden by orally notifying the court and prosecutor prior to filing the written petition that defendant might be eligible for Proposition 47 relief because, as reflected in the record, the stipulated amount of restitution was $700. But the trial court was not limited to the record of conviction in determining the value of the stolen property. (See, e.g., *People v. Perkins*, *supra*, 244

Cal.App.4th at p. 140, fn. 5.) When the trial court was considering defendant's petition,[6] it had not only the stipulated restitution amount, but it also had Kelley Blue Book value on the car as well as a photograph demonstrating the condition of the vehicle. While defendant on appeal now argues that the trial court should not have considered this evidence, he did not raise this argument below, thereby forfeiting the objection on appeal.

Defendant's failure to make a prima facie showing through evidence in his written petition that the value of the automobile taken was $950 or less renders inconsequential his claims of error on this appeal. We affirm the order denying defendant's Proposition 47 petition, because defendant failed to meet this threshold burden.[7] "Although this analysis is different from the trial court's, 'we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm.' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 351, fn. 11; see also *Perkins*, *supra*, 224 Cal.App.4th 129, 139.)

DISPOSITION

The order appealed from is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.

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6 We conduct this analysis assuming, without deciding, that the trial court could properly consider this evidence that was not attached to the written petition itself.

7 In *Sherow*, the court indicated a defendant may file a new request for Proposition 47 relief with evidence of eligibility. (*Sherow*, *supra*, 239 Cal.App.4th at p. 881; accord, *Perkins*, *supra*, 244 Cal.App.4th 129, 142.)